

Founding a Human Rights Culture for Trade Marks:
A Human Rights-Based Analysis of
Tobacco Plain Packaging and Anti-Counterfeiting
in Australia

Genevieve Wilkinson

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CERTIFICATE OF ORIGINAL AUTHORSHIP

I, Genevieve Wilkinson, declare that this thesis, is submitted in fulfilment of the requirements for the award of Doctor of Philosophy, in the Faculty of Law at the University of Technology Sydney.

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TABLE OF ACRONYMS

AAAQ	Availability, Accessibility, Acceptability and Quality
ABF	Australian Border Force
ACIP	Advisory Council on Intellectual Property
ACT	Australian Capital Territory
ACTA	Anti-Counterfeiting Trade Agreement
AHRC	Australian Human Rights Commission
AJPCHR	Australian Joint Parliamentary Committee on Human Rights
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
AUSFTA	Australia-United States Free Trade Agreement
BIRPI	Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle
CHAFTA	China Australia Free Trade Agreement
CJEU	Court of Justice of the European Union
COMRC	Committee on the Rights of the Child
COP	Conference of Parties
CRC	Convention on the Rights of the Child
DSU	Dispute Settlement Understanding
DSB	Dispute Settlement Body
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESCOR	Economic and Social Council Official Records
FCTC	Framework Convention on Tobacco Control
FTAAP	Free Trade Area of the Asia-Pacific
GAOR	General Assembly Official Records
GATT	General Agreement on Tariffs and Trade
HRCS	Human Rights Compatibility Statement
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission

INN	International Non-Proprietary Name
IPAC	Intellectual Property Advisory Committee
IPTA	Institute of Patent Attorneys of Australia
ISDM	Investor-State Dispute Mechanism
JSCOT	Joint Senate Committee on Treaties
NGO	Non-Government Organisation
NHRI	National Human Rights Institution
NSW	New South Wales
OHCHR	Office of the High Commissioner of Human Rights
RCEP	Regional Comprehensive Economic Partnership
TBT	Agreement on Technical Barriers to Trade
TGA	Therapeutic Goods Act 1989 (Cth)
TRIPS	Agreement on Trade Related Aspects of Intellectual Property
TPP-11	Comprehensive and Progressive Agreement for Trans-Pacific
TPP 2016	Trans-Pacific Partnership Agreement
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Economic and Social Council
UPR	Universal Periodic Review
VCLT	Vienna Convention on the Law of Treaties
WCO	World Customs Organisation
WHO	World Health Organization
WIPO	World Intellectual Property Organisation
WTO	World Trade Organization

ABSTRACT

It is important to recognise the human rights implications of trade mark law using a human rights-based approach to analysis of intellectual property that is part of a broader culture for trade marks which encourages compliance with human rights. International scholarly debate about the best way to conceptualise the relationship between intellectual property and human rights does not concentrate on trade marks. This research contributes a new approach to this scholarship, drawing on two case studies of Australian trade mark legislation to understand the position of trade marks more comprehensively. The case studies demonstrate that rights conferred by trade marks and the mechanisms used to protect trade marks can have important human rights implications. Disputes about tobacco plain packaging legislation demonstrate potential conflicts between trade mark rights and human rights to health, property and the right to benefit from science and culture. The scope of protection mechanisms to discourage the use of counterfeit trade marks indicates potential conflicts between trade mark rights and civil rights, although effective protection against counterfeiting could aid realisation of the human right to health.

The findings in the case studies reinforce concerns that features of the international legal environment influence states to give trade mark rights and associated protection mechanisms primacy over human rights in domestic lawmaking. This limits the ability of states to recognise their binding human rights obligations in international law. Protection for intellectual property through bilateral, plurilateral and multilateral trade agreements can also have a chilling regulatory impact on the realisation of human rights obligations. The negotiation and impact of these agreements needs to be reconsidered from a human rights perspective.

This thesis contributes to the field by proposing an analytical approach to intellectual property that recognises interdependent human rights obligations and special features of economic, social and cultural rights that are important to the relationship between intellectual property and human rights. The analytical approach should be used with other approaches recommended by existing models that conceptualise the relationship between intellectual property and human rights, to build a human rights culture for trade marks that emphasises binding human rights obligations. The approaches considered can also be modified to respond to local conditions in individual states. Using a range of analytical approaches in a manner that recognises different local conditions will have potentially valuable application in Australia, where there are several problems with the comprehensive implementation of human rights obligations. Further modifications that respond to specific conditions in other states could enable these analytical approaches to be used together to more broadly shape a human rights culture for trade mark

protection internationally so that states can promote and foster their binding international human rights obligations.